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Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room TW-A325  
Washington, DC 20554

RE: Notice of Proposed Rulemaking on the Acceleration of Broadband Deployment by  
Improving Wireless Facilities Siting Policies (FCC 13-122)  
WT Docket #s: **13-238**, 11-59, 13-31

Dear FCC Representative,

Thank you for the opportunity to submit comments on the *Notice of Proposed Rulemaking on the Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies* ("NPRM") released by the FCC on September 26, 2013, and summarized in the Federal Register on December 5, 2013 (Vol. 78, No. 234, pp. 73144-73169). The comments here submitted respond to questions related to whether and how the FCC should interpret Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Section 6409(a)").

### **Background & General Comments**

The interpretation of Section 6409(a) the proposed rule presented in the NPRM concern the California Coastal Commission ("Coastal Commission") because the plain language of the Section 6409(a) would seem to divest state and local governments of the discretion to regulate the siting, deployment and physical configurations of requests to collocate or modify wireless facilities and equipment at sites with pre-existing wireless infrastructure ("eligible facilities requests" or "covered requests"):

*A State or local government may not deny and shall approve any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.*<sup>1</sup>

Section 6409(a) explicitly supersedes all of the local zoning and radio frequency emissions rights reserved to state and local governments in the Telecommunications Act of 1996 ("TCA") as well as "any other provision of law"<sup>2</sup>, which could be interpreted to include every other pre-existing federal, state and local law or regulation. Even disregarding the burden imposed on state and local governments to implement and administer a federal program, Section 6409(a) has the

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<sup>1</sup> 47 U.S.C. § 1455(a) (2013)

<sup>2</sup> *Id.*

potential to undermine local policies and zoning regulations designed to protect resources deemed valuable by the residents of the state or locality in which the wireless facilities would be located. Section 6409(a) also has the potential to substantially impede the ability of the Coastal Commission and its local government partners to fulfill their mandate, under the California Coastal Act of 1976 (“Coastal Act”), to protect the visual and scenic resources of the California coast. How the FCC interprets this statute will determine the degree to which local authority is abrogated, and thus the magnitude of the threat it poses to protected coastal resources in California. Coastal Commission staff urges the FCC to interpret Section 6409(a) narrowly, insofar as possible preserving the ability of state and local governments to continue to strike a rational balance between the siting of wireless facilities and the protection of sensitive resources.

### *Responsibility of the Coastal Commission to Protect Coastal Resources*

The Coastal Commission is a state agency, established by voter initiative in 1972 and made permanent by the California Legislature under the Coastal Act of 1976, charged with the protection, conservation, restoration and enhancement of the environmental and human resources of the California coastal zone for sustainable and prudent use by current and future generations. In partnership with coastal cities and counties, the Coastal Commission plans and regulates the use of land and water within the coastal zone and implements the resource protection policies of the Coastal Act. The Coastal Commission is also one of California’s designated agencies for the purpose of administering the federal Coastal Zone Management Act, and in this capacity has the authority to review federal agency actions and federally licensed, permitted or assisted activities, wherever they may occur, if the activity affects coastal resources.

Section 30251 of the Coastal Act instructs the Coastal Commission to consider and protect the scenic and visual qualities of coastal areas as a resource of public importance:

*Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas . . . shall be subordinate to the character of its setting.*<sup>3</sup>

In areas where local governments have assumed responsibility for implementing the Coastal Act, they have developed similar policies which further take into account the particular set of visual and scenic resources existing within their jurisdictions, and also the visual character of local communities.

In permitting new development, including the siting and installation of new wireless facilities, the Coastal Commission and its local government partners must balance Coastal Act requirements to protect visual and scenic resources (including in some cases the integrity of historic buildings and structures) with the need to foster healthy economies

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<sup>3</sup> California Public Resources Code, Division 20, § 30251.

along the coast. Often these imperatives are fully compatible: The scenic resources of the California coast are essential to the tourism-based economies of many coastal communities. In many cases, proposed installation and modification of collocated wireless facilities will not significantly affect resources protected by the Coastal Act, and thus can be permitted quickly and without difficulty. In some cases, however, wireless collocation or modification projects have the potential to generate significant new adverse impacts on protected scenic and visual resources. In such cases, the Coastal Commission and local governments must have the authority to require project modifications or conditions of approval, or to resite a project to a different location, in order to eliminate, minimize or mitigate adverse impacts. Only with such discretionary authority intact can the Coastal Commission and local governments continue to facilitate the expansion and improvement of wireless services while still fulfilling their statutory responsibilities.

## **Specific Comments**

### *Definitions of Key Terms*

The NPRM proposes unnecessarily expansive definitions of key terms, the adoption of which would significantly enlarge the scope of Section 6409(a), further restrict local discretion, and potentially threaten protected resources along the California coast. Terms left undefined by Congress in the statute should be defined and interpreted in limited and/or specific ways so as to eliminate uncertainty and minimize the restriction of local authority.

- The term “wireless” should be explicitly defined, including a list of the types of wireless services covered by Section 6409(a); “wireless” should not be interpreted as a blanket term for all possible wireless services currently in existence or as-yet uninvented.
- “Transmission equipment” should be defined strictly, encompassing only those pieces of equipment directly involved in the transmission of wireless signals, and should not include ancillary or support equipment that is uninvolved in transmission, such as back-up power generators.
- The definition of an “existing wireless tower or base station” as any structure that “supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support” is excessively broad. Such a definition would regard any existing structure as a “wireless tower”, irrespective of its intended use or intrinsic values (e.g., historic or scenic), and would in the context of Section 6409(a) compel state and local governments to permit wireless facilities collocations and expansions without regard for existing zoning laws and impacts to protected scenic and visual resources.
- The FCC should adopt narrow a definition of “existing wireless tower or base station” which encompasses only those structures that currently support or house wireless facilities and whose *primary purpose* is to support or house wireless facilities. For example, under this definition, a tower built for the express purpose

of supporting wireless equipment that is currently in use would qualify as an “existing wireless tower”, but buildings, streetlights, water towers and flagpoles, to name a few, would not qualify, even if the support or housing of wireless facilities is a pre-existing but otherwise incidental, secondary use of the structure.

- The FCC should reject an interpretation of “existing wireless tower or base station” that would encompass all types of existing structures that *could* support wireless facilities, but do not already do so. Virtually any self-supporting structure may be capable, in theory, of supporting or housing wireless facilities of one sort or another, but to define this universe of structures that have never before been used as wireless sites as “existing wireless towers or base stations” would represent a nonsensical extension of the plain language of Section 6409(a), and would further threaten the authority of state and local governments to regulate land use within their jurisdictions.

#### *What Constitutes a “Substantial Change in Physical Dimensions”?*

One of the few ways in which Section 6409(a) preserves local discretion is the provision by which state or local permitting agencies are not required to approve requests to modify an existing wireless tower or base station when the modification would “substantially change the physical dimensions” of the existing infrastructure. The FCC should preserve this provision of the law by adopting logical standards for what constitutes a “substantial change in physical dimensions.”

- The first proposed test for substantiality (i.e., whether the modification would increase the height of an existing tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, with an exception for cases in which larger increases are needed to avoid interference) does not provide meaningful limits on the size or obtrusiveness of wireless site modifications, and in many conceivable circumstances would give rise to mandatory approval of structures with significant adverse impacts on visual and scenic resources.
- The second proposed test (i.e., whether the modification would involve installation of more than the “standard” number of new equipment cabinets for the technology involved, “not to exceed four”) places no real limits on the substantiality of potential modifications that would be required to be approved. First, it is unclear what the “standard” number of cabinets is for the various wireless technologies; second, there is no limit on the **size** of these cabinets, which is at least as pertinent to the question of substantiality as the total number.
- Similar to the first test, the third test (governing the size of lateral appurtenances to the body of an existing tower) is too lax, and has the potential to result in modifications that, in many circumstances, would result in a substantial (and potentially adverse) change to the visual appearance of the wireless site.
- The fourth test (governing the substantiality of any excavation associated with modifying an existing wireless site) broadly defines a “current tower site” as the

boundaries of the leased or owned property surrounding the tower, and would require local authorities to approve modifications even if they involved excavation of the entire property on which the wireless facility is located. While this is an extreme scenario, even lesser excavations could have adverse impacts on local resources and should be subject to local discretionary review.

- The proposed numerical and percentage-based standards for determining what constitutes a “substantial change” cannot be applied in all situations and environmental settings without risking harm to visual and scenic resources. The Coastal Commission recommends that the FCC adopt rules which would allow leeway for local authorities to determine what constitutes a “substantial change” based on the characteristics of the local setting. Alternatively, any set of universal standards should be flexible enough to be applied in different settings without harming the visual and scenic resources specific to those areas.
- The use of a variety of camouflage techniques are a primary tool by which state and local authorities can allow wireless facilities to be built while continuing to meet their statutory obligations to protect visual and scenic resources. Regulations proposed in the NPRM should not grant eligible facilities requests under Section 6409(a) a blanket exemption from local rules requiring camouflage. Nor should the modifications and collocations covered by Section 6409(a) be allowed to be used as a pretext for removing camouflage from existing wireless sites. In other words, the FCC should include a “camouflage preservation rule” in its proposed regulations.

#### *Preserving Local Permit Authority*

To the maximum extent possible, the FCC should adopt implementing regulations that preserve state and local authority to regulate and wireless facility modifications and collocations (“covered requests”).

- State and local agencies must be able to modify or require resiting of covered requests on the basis that they will violate state or local regulations designed to protect life and property, minimize natural hazards, and assure the stability and structural integrity of existing or newly developed structures.
- Covered requests should not be exempted from full discretionary environmental review if there is a reasonable potential for them to result in significant impacts. More specifically, the FCC should not interpret Section 6409(a) as forcing local authorities to process covered requests administratively, regardless of their potential impacts on protected resources.
- State and local agencies must be able to impose reasonable conditions, including project modifications and/or mitigation measures, on approvals of covered requests. Without this authority, local and state agencies will not be able to fulfill their statutory responsibilities under state law and local ordinances, and may in some cases be forced to choose between violating state, local, or federal laws and regulations. In other words, the FCC should not adopt regulations under Section 6409(a) that would require unconditional approval of covered requests.

- The FCC should not interpret Section 6409(a) as exempting covered requests from local building codes and land use ordinances. Local building codes and land use ordinances are primary tools by which local and state authorities fulfill their responsibilities under the California Coastal Act (and many other laws), and are typically designed to meet specific and important local goals and needs. These codes and ordinances, which were developed detailed knowledge of local circumstances, should not be arbitrarily abrogated by a blanket Federal action.

*Time Limits for Review*

The NPRM proposes a 90-day time-frame as the presumptively reasonable time to approve a covered request. In many cases, this time-frame will differ from locally-adopted time-frames for project review and permit issuance. The Coastal Commission urges the FCC to allow local time limits to remain in place, and avoid the creation of a separate "track" for review of wireless facility collocations and modifications.

- At the very least, the FCC should not adopt a time-frame shorter than 90 days for review of covered requests.
- State and local authorities must retain the ability to delay the start of the review period until an applicant submits a complete application for a covered request. Were the FCC to deny this right, it would damage the ability of local authorities to carry out their statutory responsibilities, particularly in complicated or controversial cases in which the collection of complete and accurate information is especially critical. Moreover, denial of this right would create an unintended and counterproductive incentive for applicants to submit incomplete applications and intentionally withhold critical information.

Thank you for your consideration of these comments. If you have any questions about these comments, please feel free to contact me at 415-904-5249 or [joseph.street@coastal.ca.gov](mailto:joseph.street@coastal.ca.gov).

Sincerely,



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